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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-5014

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

Petr REPLY BRIEF

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REPLY BRIEF

Petitioner's response to the State's opposition to the request for a writ will be restricted to two points. First, we contend that the position expressed in Respondent's Brief, to the point that Harris v. New York, 401 U. S. 222 (1971), is determinative of our contentions based on the exposure to the jury, over objections, that petitioner had exercised his right of silence following his arrest, and in so doing failed to tell the police or the judge at the Preliminary Hearing that his defense to these charges was that he had been framed.

In making this sterile argument, counsel for the Respondent has obviously failed to reckon the cogent observation, made by this Court, in United States v. Hale, ____U.S.____ (June 23, 1975), to the effect that "not only is silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice."

For, surely, if it is a valid conclusion that the "silence during police interrogation [in Hale] lacked signfficant probative value and that any reference to his silence under such circumstances carried with it an intolerable prejudicial impact," (id, at ___), then surely this must likewise be true here. For in our case, contrary to what was done in Hale, the trial court permitted the entire line of assailed questions[1] to be fully exploited. Not only this, the trial court expressly authorized the prosecution to argue these and related points to the jury.

Then there is the fact here that some of the cases "commended" to this Court as well reasoned and persuasive authority in support of their thesis (Brief of Respondent, p. 5), were pointedly rejected by this Court.

Here reference is being made to the cases of United States ex rel Burt v. New Jersey 475 F 2d 234 (3d Cir. 1973); and United States v. Ramirez, 441 F 2d 950 (5th Cir. 1971) cert. den., 404 U.S. 869. Thus, it could not be clearer, the State's espousal of the anachronistic notion as expressed in the following segment of the Opinion by the Court of Appeals, simply cannot be validated. Here the Court of Appeals stated:

> "After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R 504-508).
>
> This was not evidence offered by the state in its case in chief as confession by

silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness." (See Appendix, Petition for Certiorari, p. 42.)

As to all this, it may suffice simply to say that this ruling by the Court of Appeals is diametrically opposed to the position taken by this Court in Hale.

Thus we contend that, for this reason alone, the grant of certiorari in this case should be assured. On the other hand, our case is much stronger than Hale. For, here, the trial court not only overruled our objections to these constitutionally impermissible questions, the Court affirmatively permitted counsel for the State to not only fully exploit this line of questioning, but to argue the resultant inferences, and other related points to the jury. Here we have reference to the additional questions based on why petitioner did not reveal his version of the facts at the preliminary hearing, and why he refused to consent to the search of the car, which required the police to obtain a search warrant.

The above comparisons with this Court's decision in Hale certainly demonstrate crucial flaws in this petitioner's conviction. On the other hand, perhaps an even greater flaw in this conviction is exposed from the fact that in Hale the trial Court had both sustained defense objections to the impermissible line of questioning and instructed the jury to disregard its implications; whereas, the trial Court here not only permitted the entire line of questioning to be exhausted but affirmatively allowed these points to be argued to the jury.

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Also, the point must be made here that the penalty provision of the statute, under which Doyle was sentenced to a term of 20-40 years for the sale of marijuana, has been declared unconstitutional by the Sixth Circuit Court of Appeals, in Downey v. Perini, ___F 2d___ (decided July 3, 1975, Case No. 74-1929). While a stay of execution has been granted the State in that cause, pending application in this Court for a writ of certiorari, the point must still be made here that should this Court sustain the Sixth Circuit's Downey decision then surely this is a further factor that should cause this Court to deal directly with this cause.

Respectfully submitted,

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